No. 764

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No. 15387

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United States
Court of Appeals
for the Ninth Circuit

JO EISINGER and LORAIN B. EISINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of Record

Petition to Review a Decision of the Tax Court of the United States

No. 15387

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JO EISINGER and LORAIN B. EISINGER,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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APPEARANCES

ROSENTHAL AND NORTON, by
NORMAN GOODMAN,
242 North Canon Drive,
Beverly Hills, Calif.,

For the Petitioner.

CHARLES K. RICE,
Assistant U. S. Attorney General;

LEE A. JACKSON,
Attorney, Department of Justice,
Washington 25, D. C.,

For the Respondent.

The Tax Court of the United States

Docket No. 47,871

JO EISINGER AND LORAIN B. EISINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

10/1/56—Assigned to Judge LeMire, recalled to duty.

DOCKET ENTRIES

1953

Apr. 17—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 20—Copy of Petition served on General Counsel.

June 3—Answer filed by General Counsel.

June 3—Request for hearing in Los Angeles, Calif., filed by General Counsel.

June 10—Notice issued placing proceeding on Los Angeles calendar. Service of Answer and Request made.

1954

May 5—Hearing set June 30, 1954, Los Angeles, Calif.

July 8—Hearing had before Judge LeMire on the merits. Stipulation as to facts to be filed in Washington, D. C., on or before August 9, 1954. Briefs due September 24, 1954. Replies due October 25, 1954.

1954

July 27—Transcript of Hearing 7/8/54 filed.

Aug. 13—Stipulation as to Facts filed.

Sept. 13—Brief filed by petitioner. 9/27/54—Copy served.

Sept. 24—Brief filed by General Counsel.

1956

Feb. 29—Memorandum findings of Fact and Opinion filed, Judge LeMire. Decision will be entered under Rule 50. 3/1/56—Copy served.

June 7—Entry of appearance of Norman Goodman as counsel filed.

June 12—Agreed computation for entry of decision filed.

June 13—Decision entered, Judge LeMire, Div. 5.

Sept. 10—Petition for Review by U. S. Court of Appeals for the Ninth Circuit filed by petitioner.

Sept. 10—Proof of Service filed.

Sept. 11—Notice of filing petition for review, with proof of service thereon, filed.

Sept. 24—Designation of contents of record on review, with proof of service thereon, filed by petitioner.

Oct. 12—Order extending time to file the record on review and docket the petition for review to 12/9/56, entered. Served 10/15/56.

The Tax Court of the United States

Docket No. 47,871

JO EISINGER AND LORAINE B. EISINGER, Husband and Wife,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE.

Respondent.

PETITION

The above-named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, A:R: 90D:LHP, dated January 29, 1953, and as a basis for their proceeding allege as follows:

1. Petitioners are individuals, husband and wife, with their present residence at Hotel Claridge, Avenue des Champs Elysees, Paris, France. The returns for the periods here involved were filed with the collector for the Los Angeles District of California.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioners, care of their attorney, Aaron B. Rosenthal, 416 West Eighth Street, Suite 1009-16, Los Angeles 14, California, on January 29, 1953.

3. The deficiencies as determined by the Commissioner are in income taxes for the calendar years 1949 and 1950, in the respective amounts of $3,433.58, for the calendar year 1949, and in the

amount of $925.76, for the calendar year 1950; and that, of the deficiency for the year 1949, all thereof is in dispute; that of the deficiency for the year 1950, all thereof is in dispute.

4. With certain determinations ,made, as set forth in said Exhibit A, petitioners herein make no objections, nor do they contest these. In fact, these were arrived at after conferences between petitioners and the staff of the Hollywood, California, office of the Director's Office. For example:

Under the heading "Adjustments to Net Income. Taxable Year Ended December 31, 1949," are certain items, "Unallowable deductions and additional income," enumerated from (a) to (f), both inclusive. Petitioners acknowledge the correctness of item (a), being the "Ordinary income from sale of story, 'Confidential Squad,' $11,036.68," but maintain for reasons hereinafter set forth that this income should be considered as income subject to the provisions of Section 107 (a) of the Internal Revenue Code. Also, petitioners acknowledge the correctness of, and do not contest, the following other items: (b) "Automobile expense disallowed, $289.24"; (c) "Taxes disallowed, $100.00"; (d) "Unemployment insurance disallowed, $9.00"; (e) "Medical expense disallowed, $695.82." Petitioners emphatically reject and contest (f) "Alimony disallowed, $1,925.00."

Under the heading, "Reduction of Income," appears item (g): "Long-term capital gain from sale of story 'Confidential Squad,' $5,141.00." Petition-

ers consent to the disallowance of this item because they acknowledge now, as they did in the informal conferences with the revenue staff referred to above, that it was improper to claim a long-term capital gain in respect of the net proceeds of the sale of the story. As indicated above, a different treatment of the income from the sale of the story is sought by petitioners.

Under the heading "Explanation of Adjustments" are explanations of the computations of the various items set forth under "Adjustments to Net Income." With all of these explanations petitioners are in accord save as to item (*1*), which relates to the disallowed alimony in the amount of $1,925.00.

For the reasons set forth above in this paragraph, petitioners object to and reject the "Computation of Tax, Taxable Year Ended December 31, 1949," as set forth in said Exhibit A. More specifically, petitioners point out that, while alimony was disallowed in an amount of $1,925.00, on the ground that it actually was for the support of two minor children and not for alimony, the computation augments the exemptions by adding to those claimed by petitioners in their 1949 return, an additional amount representing deductions for the two children. Furthermore, petitioners maintain that only a portion of the income derived from the sale of the story "Confidential Squad" should have been included in the computation, whereas all of the net income was included therein for the year 1949.

Under the heading "Adjustments to Net Income,

Taxable Year Ended December 31, 1950," is an item, "Unallowable deduction: (a) Alimony disallowed, $3,364.50." Petitioners reject this disallowance for the same reasons and on the same grounds that they reject the disallowance of the item of alimony in the amount of $1,925.00 in the 1949 return. The same basic questions of law are involved in each such disallowance and petitioners' position with respect thereto. Therefore, petitioners reject the "Computation of Tax, Taxable Year Ended December 31, 1950," as same appears in said Exhibit "A"; this for these reasons: (1) that the tax itself should be altered by allowing the disallowed alimony payments, and (2) by diminishing the exemptions of $4,200.00 by eliminating the two exemptions for the two minor children which have been arbitrarily included in the computation.

5. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The Commissioner erroneously determined that the entire net income of $11,036.68 attributed to the sale of the story, "Confidential Squad," was subject to taxation in the calendar year 1949 instead of determining that said income was subject to Section 107 (a) of the Internal Revenue Code and that only a portion thereof, substantially 33⅓ per cent thereof, should have been included in the gross income of petitioners for the year 1949.

(b) With respect to the calendar years 1949 and 1950, the Commissioner erroneously determined that

a portion of the payments made by petitioner, Jo Eisinger, to his former wife, Wilhelmina Eisinger, in said years, namely, $1,925.00 in 1949 and $3,364.50 in 1950, represent payments made for the support of the said Jo Eisinger's two minor sons and did not constitute proper deductions under the provisions of Section 23 (u) of the Internal Revenue Code.

6. The facts upon which petitioners rely as the basis for this proceeding are as follows:

Upon information and belief:

Petitioner, Jo Eisinger, first conceived the idea for "Confidential Squad" in 1945 as something for radio. Said petitioner wrote several brief synopses thereof and registered an early one of these, under the title "Confidential Squad," with the Screen Writers' Guild. After several months, said petitioner wrote an initial script and discussed it with his agents at Famous Artists, Los Angeles County, California. They recommended changes and said petitioner then made several other versions of the script and had a script satisfactory to him at the close of 1946. Said petitioner then discussed this script with Hubbel Robinson, vice president of Columbia Broadcasting System, while at the Beverly Hills Hotel in Beverly Hills, California. Mr. Robinson rejected the idea for radio, but suggested that it might be rewritten for television. Said petitioner then wrote a number of scripts embodying the idea of "Confidential Squad" for television, always in conference with his said agent, spending a great

deal of time in 1947 in this activity, and being baffled by the many production problems that arose. He wrote probably a dozen scripts around the idea in that year. In 1948, said petitioner first attempted to use his material at hand by writing it as a long short story for a magazine, but abandoned the work at the instance of one of his said agents. Then, Edward Lasker, who became interested in the idea, arranged to have said petitioner introduced to the Confidential Squad of the Police Force of the City of New York, and, as a result, said petitioner spent about six weeks in New York City with this squad, obtaining from this experience the material which he decided to incorporate into a screen play. Said petitioner then returned to California and there wrote the screen play. Lasker then found that he could not finance the production, so said petitioner in 1949 sold the script to Universal-International, which finally made the film under the title "The Sleeping City." The sale to Universal-International was made in 1949. So, said petitioner maintains, the script represents a constant labor over a period of more than three years prior to the date of its sale, and all of the proceeds of sale were received in the year of sale.

Prior to May 26, 1949, the said Jo Eisinger and Wilhelmina Eisinger were husband and wife and were the parents of two sons, Carl, who was then 16 years old, and Lloyd, who was then 10 years old. The boys were in the actual custody of their mother, who was living in Dade County, Florida. Mr. Eisinger was living in Los Angeles County, Cali-

fornia. As a consequence of domestic difficulties between them a divorce action was started by Wilhelmina Eisinger in Dade County, and following that, the parties effected a written property settlement agreement and an agreement affecting the care and custody of the two minor sons, under date of March 28, 1949, and this later was modified by a written modification thereof, dated April 29, 1949, by the terms of which paragraphs 4 and 5 of the original agreement were amended by the substitution of new paragraphs 4 and 5, all of the rest of the original agreement being retained. This agreement, with its modification, was incorporated in a final decree entered in the divorce action on May 26, 1949. A true and correct copy of this final decree, embodying the original agreement and its modification, is attached hereto as Exhibit "B."

The payments made by the said Jo Eisinger to the said Wilhelmina Eisinger, which are the subject of the Commissioner's determination, were made pursuant to the said property settlement agreement and said final decree of divorce embodying and approving same. It is contended that all of these payments were made to Wilhelmina Eisinger as alimony payments.

Wherefore, petitioners pray that this Court may hear the proceeding and determine:

(a) With respect to the 1949 income tax return, that (1) petitioners should be permitted to account therein for only one-third of the net income received

in 1949 for the sale of the story, "Confidential Squad," instead of the whole net proceeds of sale, and (2) that the entire disallowed item of $1,925.00 be restored to the deductions permitted, and that any deductions made by the Commissioner as a deduction for the two minor children of petitioner, Jo Eisinger, be eliminated; and

(b) With respect to the 1950 income tax return, that the entire claimed deficiency in the amount of $925.76 be disallowed.

/s/ AARON B. ROSENTHAL,
Counsel for Petitioners.

Duly verified.

EXHIBIT "A"

Form 1230

U. S. Treasury Department
Office of the Director of Internal Revenue
Head, Audit Division
417 South Hill Street
Los Angeles, California

In reply refer to:
A:R:90D:LHP

Jan. 29, 1953.

Mr. Jo Eisinger and
Mrs. Loraine B. Eisinger,
Husband and Wife,
c/o Mr. Aaron B. Rosenthal,
416 West 8th Street, Suite 1009-16,
Los Angeles 14, California.

Dear Mr. and Mrs. Eisinger:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1949, and December 31, 1950, discloses a deficiency of $4,359.34, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days of the date of the mailing of this letter you may file a petition with the Tax Court of the United States at its principal address, Washington 4, D. C., for a redetermination of the deficiency. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Director of Internal Revenue, Audit Division, 417 South Hill Street, Los Angeles 13, California. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

JUSTIN F. WINKLE,
Acting Commissioner;

By R. A. RIDDELL,
Director.

Enclosures:
Statement
Form 1276
Agreement Form

A:R:90DLLHP

Mr. Jo Eisinger and Mrs. Loraine B. Eisinger
Husband and Wife
c/o Aaron B. Rosenthal
416 West 8th Street, Suite 1009-16
Los Angeles 14, California

Tax Liability for the Taxable Years Ended
December 31, 1949, and December 31, 1950

Year		Deficiency
1949	Income Tax	$3,433.58
1950	Income Tax	925.76
	Total	$4,359.34

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated November 18, 1952.

Your income tax returns for the taxable years 1949 and 1950 disclose payments of $3,850.00 and $6,677.00, respectively, made to Wilma Eisinger, former wife of Jos. Eisinger, which you deducted from your income as alimony. It has been determined that of such payments the amounts $1,925.00 and $3,364.50 represent payment for the support of Jo Eisinger's two minor

sons for the years 1949 and 1950, respectively, which do not constitute proper deductions under the provisions of section 23(u) of the Internal Revenue Code. Appropriate adjustment is accordingly made herein to disallow the excessive alimony claimed, and to allow exemptions for the two sons for the year 1950, not claimed in your return for such year.

Adjustment to Net Income
Taxable Year Ended December 31, 1949

Net Income as disclosed by return		$26,176.14
Unallowable deductions and additional income:		
(a) Ordinary income from sale of story "Confidential Squad"	$11,036.68	
(b) Automobile expense disallowed	289.24	
(c) Taxes disallowed	100.00	
(d) Unemployment insurance disallowed	9.00	
(e) Medical expense disallowed	695.82	
(f) Alimony disallowed	1,925.00	14,055.74
Total		$40,231.88
Reduction of income:		
(g) Long-term capital gain from sale of story "Confidential Squad"		5,141.00
Net income adjusted		$35,090.88

Explanation of Adjustments

(a) and (g) In your income tax return for the calendar year 1949 you reported a net gain in the amount of $10,282.00 from the sale of a story entitled "Confidential Squad." Fifty per cent of this amount, or $5,141.00, you considered subject to tax as capital gain under the provisions of section 117 of the Internal Revenue Code. It is held that ordinary income in the amount of $11,036.68 was realized by you from this transaction within the meaning of the Internal Revenue Code and your income is increased accordingly. The amount of $11,036.68 is computed as follows:

Sale price of story, as shown by return			$15,001.00
Less expenses:			
Agent's commission (per return)		$ 1,500.00	
Travel expense (per return)		405.00	
Hotel and entertainment expenses (per return)	$2,814.00		
Less: Amount unsubstantiated	754.68	2,059.32	3,964.32
Ordinary income, as determined			$11,036.68

The reported long-term capital gain of $5,141.00 from the sale of the above-mentioned story is eliminated from your income.

(b), (c) and (d) The deductions claimed in your return for the following items are disallowed to the extent shown below due to lack of substantiation that such disallowed amounts constitute proper deductions under section 23 of the Internal Revenue Code:

Item	Amount Claimed in Return	Amount Allowable	Amount Disallowed
Automobile expense	$715.99	$426.75	$289.24
Sales tax	649.60	549.60	100.00
Unemployment insurance	39.00	30.00	9.00

(e) It is determined that the correct deduction for medical expenses is the amount of $1,561.15, in lieu of $2,256.97, the amount claimed in your return. The excessive amount claimed, $695.82, is disallowed. The amount of $1,561.15 is computed as follows:

Total medical expense, as shown by return	$3,937.91
Less: 5% of $47,535.74, adjusted gross income as corrected	2,376.76
Medical deduction allowable	$1,561.15

(f) This adjustment has been previously explained.

Computation of Tax
Taxable Year Ended December 31, 1949

Net income adjusted		$35,090.88
Less: Exemptions		3,600.00
Balance, subject to surtax and normal tax		$31,490.88
One-half of $31,490.88		$15,745.44
Tentative normal tax and surtax	$ 5,080.36	
Less reduction under Sec. 12(c), I.R.C.	629.64	
Total normal tax and surtax on one-half of net income		$ 4,450.72
Combined normal tax and surtax ($4,450.72 x 2)		$ 8,901.44
Correct income tax liability		$ 8,901.44
Income tax liability shown on return, Account No. 3250307		$ 5,467.86
Deficiency of income tax		$ 3,433.58

Adjustment to Net Income
Taxable Year Ended December 31, 1950

Net income as disclosed by return	$32,622.33
Unallowable deduction:	
(a) Alimony disallowed	3,364.50
Net income adjusted	$35,986.83

Explanation of Adjustment

(a) This adjustment has been previously explained.

Computation of Tax
Taxable Year Ended December 31, 1950

Net income adjusted	$35,986.83
Less: Exemptions	4,200.00
Balance, subject to surtax and normal tax	$31,786.83

One-half of $31,786.83		$15,893.42
Tentative normal tax and surtax	$5,149.91	
Less reduction under Sec. 12(c), I.R.C.	479.49	
Total normal tax and surtax on one-half of net income		$ 4,670.42
Combined normal tax and surtax ($4,670.42 x 2)		$ 9,340.84
Correct income tax liability		$ 9,340.84
Income tax liability shown on return, Account No. 3259639		$ 8,415.08
Deficiency of income tax		$ 925.76

EXHIBIT "B"

In the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, in Chancery

No. 112550-C

WILHELMINA EISINGER,

Plaintiff,

vs.

JOSEPH EISINGER,

Defendant.

FINAL DECREE

This cause coming on to be heard before me and it appearing to the Court that said cause is at issue

on the amendment to the bill of complaint of the plaintiff and the answer of the defendant and the Court having heard the testimony of the plaintiff and her witnesses and finding from said testimony that the equities are with the plaintiff in this cause upon a complaint thereof, it is therefore

Ordered, Adjudged and Decreed as follows:

1. That this Court has jurisdiction of the parties and the subject matter involved in this cause.

2. That the bonds of matrimony heretofore existing between the plaintiff, Wilhelmina Eisinger, and the defendant, Joseph Eisinger, be and they are hereby forever dissolved and they are forever divorced from each other, a Vinculo Matrimonii.

3. That the care, custody and control of the minor children of the parties, to wit: Carl Eisinger and Lloyd Eisinger, is hereby awarded to the plaintiff, Wilhelmina Eisinger, with the right to the defendant, Joseph Eisinger, of reasonable visitation at all times.

4. That the property settlement agreement and the property settlement agreement modification entered into between the parties, being the plaintiff Exhibits I and II and reading in words and figures as follows:

I.

Property Settlement Agreement

This Agreement, made this 28th day of March, 1949, by and between Joseph Eisinger, hereinafter

referred to as the "Husband," and Wilhelmina Eisinger, hereinafter referred to as the "Wife."

Witnesseth:

Whereas, the Wife has instituted an action for divorce against the Husband, and

Whereas, the parties desire to settle all differences between them,

Now, Therefore, in consideration of the premises and of the terms and conditions hereinafter set forth, It Is Agreed:

1. The parties shall at all times hereafter live and continue to live separate and apart, and they shall not molest nor interfere with each other, nor compel nor attempt to compel the other to cohabit or dwell with the other, and each shall be free from interference, authority and control, direct or indirect, by the other. Each party may reside at such place or places as he or she may select; and each may, for his or her separate use, benefit and estate, conduct, carry on and engage in any business, profession or employment as to him or her may seem advisable, and the avails thereof shall be his or her separate property.

2. The Wife shall have the custody of the children of the marriage, viz., Carl Eisinger, born August 24, 1933, and Lloyd Eisinger, born November 2, 1938. The Husband shall have the right of visitation at any and all times. The Husband shall also have the right to have either or both of said

sons visit him, at such place as the Husband may designate, during holiday seasons. The Wife shall at all times advise the Husband in writing of the residences and whereabouts of each and both of said sons from time to time as the same may change.

3. (a) The parties agree that there is no community property.

(b) The parties agree that each party shall own and enjoy, independent of any right of claim of the other, as his or her sole and separate property, all personal and real property belonging to him or her and now in his or her possession, or which may hereafter belong to him or her or come into his or her possession, with full power and disposition during the lifetime of each party or after death, as though he and she were unmarried.

4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Dollars ($100.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida, in and for Dade County, in Chancery, Number 112550-C, and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the Husband. Upon the

remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Twenty-five Dollars ($25.00) per week for the support and maintenance of each child, of said marriage until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Twenty-five Dollars ($25.00) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Fifty Dollars ($50.00) per week during the life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the Husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Twenty-five Dollars ($25.00) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Fifty Dollars ($50.00) per week.

5. (a) The Husband agrees to pay to the Wife the following sums:

(1) Fifteen Hundred Dollars ($1500.00) on or before five (5) days from the date of notice of entry of the final decree of divorce between the parties in the action hereinbefore referred to.

(2) The sum of One Thousand Dollars ($1,000.00) on or before ninety (90) days after notice of entry of the said final decree of divorce.

(b) (1) The aforesaid sum of Twenty-five Hundred Dollars ($2500.00) is to be used by the Wife for the purpose of paying any and all bills of the Wife and as and for, and by way of counsel fees.

(2) The Wife warrants and represents that she has not incurred any obligations except those which will be paid for with the aforesaid sum of Twenty-five Hundred Dollars ($2500.00), including counsel fees to her attorneys, and that the Husband will not be called upon to pay for any debts incurred by her, and she hereby agrees to indemnify and save the Husband harmless against any and all of such debts and, in the event the Husband shall be called upon to pay any claim asserted against him by reason of a debt incurred by the Wife, he may stop paying the alimony provided for herein until the weekly alimony shall have aggregated the amount of such claim or claims.

6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. This

agreement constitutes a complete and final settlement of any and all claims, property rights, liabilities and obligations of the parties hereto in, on or as to each other, and each party shall have such rights in and to his or her person, earnings, income and property as though said parties had never been married to each other, save and except as herein provided, and each of the parties hereto, except as herein provided, renounces any and all claims for alimony, support, maintenance, attorney's fees and court costs which he or she might have against the other by reason of their marital status from this date henceforth.

(b) Each of the parties hereby waives, relinquishes and quitclaims to the other any and all interest he or she has or might have in and to the property or the estate held or had by the other, wherever and whenever acquired and of whatsoever nature, whether community or separate, now or hereafter and, in this connection, agrees that he or she shall at any time hereafter, as and when necessary or convenient, execute any and all papers or documents to give full effectiveness to the provisions of this agreement.

(c) Each of the parties hereby waives any and all rights or claims which he or she may have had by reason of their marital status to share in the estate of the other under the laws of succession or inheritance of the States of California or Florida or any other State, and relinquishes to the estate of the other any property which would have been

otherwise distributed to him or her by reason thereof, and each of the parties hereby waives and relinquishes to the other any right to act as administrator, administratrix, executor, executrix for the estate of the other.

(d) Each of the parties hereby releases and relinquishes any and all claims or rights that he or she may have had, which he or she now has, or which he or she may hereafter acquire in any capacity or to any extent whatever in the estate of the other party upon his or her death, by way of statutory allowance or distribution in intestacy or right of election to take against the other party's Last Will and Testament or right of dower or courtesy or community or otherwise, whether enumerated herein or not and whether under the laws of the States of California or Florida or of any State whatsoever.

7. The Wife agrees that she will present this agreement to the Court with the request that the same be ratified, affirmed and approved by the Court as its own act and made a part of the final decree of divorce in the action hereinbefore described, and that she will not ask the Court for any sum or make any request other than those herein contained. The Wife agrees that all of the rights granted her herein are conditioned upon and subject to her obtaining and entering a final decree of divorce in the action hereinbefore described at the earliest possible date, and that she will not take an appeal from the said decree, and if she shall fail to enter such final decree

of divorce at the earliest possible date in the action hereinbefore described, or if she shall take an appeal from the provisions thereof, all of the rights herein contained shall cease and terminate forthwith.

8. The parties have incorporated in this agreement their entire understanding. No oral statements nor prior written matter extrinsic to this agreement shall be in force or effect. The parties are not relying upon any representations other than those expressly set forth herein.

9. The parties hereto declare that each has had independent legal advice by counsel of his or her own selection; that each fully understands the facts and has been fully informed of his and her legal rights and liabilities; that after such advice and knowledge each believes the agreement to be fair, just and reasonable; that each signs the agreement freely and voluntarily.

In Witness Whereof, the parties have hereunto set their hands and seals the day and year first above written.

/s/ J. O. EISINGER,
Husband;

/s/ WILHELMINA EISINGER,
Wife.

Accepted:

FOGLE, KIRTLEY,
CONNELLY & FORDHAM,

By /s/ WM. KIRTLEY.

State of California,
County of Los Angeles—ss.

On the 28th day of March, 1949, before me, personally appeared Joseph Eisinger, known to me to be the person who executed the foregoing instrument, and acknowledged to me that he executed the same.

[Seal] /s/ JULIAN C. SORIN,
Notary Public in and for the
Said County and State.

My commission expires Aug. 24, 1951.

State of Florida,
County of Dade—ss.

On the 19th day of May, 1949, before me, personally appeared Wilhelmina Eisinger, known to me to be the person who executed the foregoing instrument, and acknowledged to me that she executed the same.

/s/ LEWIS H. FOGLE, JR.,
Notary Public.

My commission expires April 23, 1951.

II.

Property Settlement Agreement—Modification

Reference is made to that certan Property Settlement Agreement dated March 28, 1949, by and between Joseph Eisinger and Wilhelmina Eisinger,

signed by Joseph Eisinger on March 28, 1949, and to be signed by Wilhelmina Eisinger concurrently with her signing this Modification thereof.

Witnesseth:

All of the terms and conditions of that certain Property Settlement Agreement dated March 28, 1949, are hereby agreed upon and confirmed except as herein specifically provided.

Paragraph 4 is hereby amended to read as follows:

4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida, and in and for Dade County, in Chancery, No. 112550-C, and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the Husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage until such child shall

attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the Husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 Dollars ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 Dollars ($62.50) per week.

Paragraph 5 is hereby amended to read as follows:

5. (a) The Husband agrees to pay to the Wife the following sums:

(1) Fifteen Hundred Dollars ($1500.00) on or before five (5) days from the date of notice of entry

of the final decree of divorce between the parties in the action hereinbefore referred to.

(2) The sum of One Thousand Dollars ($1,000.00) on or before ninety (90) days after notice of entry of the said final decree of divorce.

(3) The sum of Five Hundred Dollars ($500.00) on or before One Hundred Fifty (150) days after notice of entry of the said final decree of divorce.

(b) (1) The aforesaid sum of Three Thousand Dollars ($3,000.00) is to be used by the Wife for the purpose of paying any and all bills of the Wife and as and for, any by way of counsel fees.

(2) The Wife warrants and represents that she has not incurred any obligations except those which will be paid for with the aforesaid sum of Three Thousand Dollars ($3,000.00), including counsel fees to her attorneys, and that the Husband will not be called upon to pay for any debts incurred by her, and she hereby agrees to indemnify and save the Husband harmless against any and all of such debts and, in the event the Husband shall be called upon to pay any claim asserted against him by reason of a debt incurred by the wife, he may stop paying the alimony provided for herein until the weekly alimony shall have aggregated the amount of such claim or claims.

In Witness Whereof, the parties have hereunto set their hands and seals.

Dated: April 29, 1949.

/s/ JOSEPH EISINGER.

Dated: May ..., 1949.

/s/ WILHELMINA EISINGER.

Accepted:

FOGLE, KIRTLEY,
CONNELLY & FORDHAM;

By /s/ WM. KIRTLEY.

State of California,
County of Los Angeles—ss.

On the 29th day of April, 1949, before me, personally appeared Joseph Eisinger, known to me to be the person who executed the foregoing instrument, and acknowledged to me that he executed the same.

[Seal] /s/ JULIAN C. SORIN,
Notary Public in and for the
Said County and State.

My commission expires Aug. 24, 1951.

State of Florida,
County of Dade—ss.

On the 19th day of May, 1949, before me, personally appeared Wilhelmina Eisinger, known to me to be the person who executed the foregoing instru-

ment, and acknowledged to me that she executed the same.

/s/ LEWIS H. FOGLE, JR.,
Notary Public in and for the
Said County and State.

My commission expires Aug. 23, 1951.

Be and the same is hereby confirmed and adopted by this Court, and the parties hereto are

Ordered and Directed to abide by and fully perform the terms of this settlement in this decree.

Done and Ordered in Chambers at Miami, Dade County, Florida, this 26th day of May, A.D. 1949.

MARSHALL C. WISEHEART,
Circuit Judge.

A True Copy.

POWER OF ATTORNEY

Know All Men by These Presents: That each of us, namely, Jo Eisinger and Lorraine B. Eisinger, his wife, each now residing in Paris, France, has made, constituted and appointed, and now by these presents does make, constitute and appoint Aaron B. Rosenthal, an attorney at law duly licensed to practice as such in and by the State of California, and practicing as such in the City of Los Angeles, in the County of Los Angeles, State of California, my true and lawful attorney for me and in my name, place, and stead to conduct all proceedings

with reference to income tax and tax returns with reference thereto, either with the Treasury Department of the United States, the Commissioner of Internal Revenue thereof, the income tax unit, the Tax Court of the United States or any and all other administrative bodies having in charge the administration of the tax laws of the United States; giving power and authority unto said attorney to receive all certificates of over-assessments, refund checks and the like.

Dated at Paris, France, this 7th day of March, 1953.

/s/ JO EISINGER,

/s/ LORRAINE B. EISINGER.

In the presence of:

/s/ [Indistinguishable.]

Received and filed April 17, 1953, T.C.U.S.

Served April 20, 1953.

[Title of Tax Court and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Charles W. Davis, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1. Admits that petitioners are individuals, husband and wife; that the returns for the periods here involved were filed with the Collector for the Los Angeles District of California. Denies the remaining allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the deficiencies as determined by the Commissioner are in income taxes for the calendar years 1949 and 1950, in the respective amounts of $3,433.58 for the calendar year 1949, and in the amount of $925.76 for the calendar year 1950. Denies the remaining allegations contained in paragraph 3 of the petition.

4. Admits the allegations of fact and concessions contained in the first, second, third, fourth and sixth unnumbered paragraphs set forth under the heading "4" in the petition; admits that the petitioners object to the "Computation of Tax, Taxable Year Ended December 31, 1949," as alleged in the fifth unnumbered paragraph under the heading of "4," but denies the remaining allegations of fact, if any, contained in said fifth unnumbered paragraph; denies that the contentions made by petitioner in all of these unnumbered paragraphs are proper, and denies that the respondent erred in any manner in his determination herein.

5. Denies the allegations of error contained in paragraph 5 of the petition and all subparagraphs thereof.

6. Admits that petitioner Jo Eisinger sold a story in 1949; admits the allegations of fact contained in the second and third unnumbered subparagraphs of paragraph 6 of the petition; denies the remaining allegations contained in paragraph 6 and all subparagraphs thereof.

7. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be sustained.

/s/ CHARLES W. DAVIS,
Chief Counsel, Bureau of
Internal Revenue.

Filed June 3, 1953, T.C.U.S.

[Title of Tax Court and Cause.]

STIPULATION AS TO FACTS

It is hereby stipulated, by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true and accepted evidence in the proceeding herein; provided, however, that this stipulation shall not waive or affect the right of either petitioners or respondent to introduce other evidence not at variance with the facts hereinafter stipulated, to wit:

1. Petitioners Jo Eisinger and Lorraine B. Eisinger are and were during the taxable years 1949 and 1950 husband and wife; and, although the former wife of the said Jo Eisinger, namely, Wilhelmine Eisinger, obtained on her own account a decree of absolute divorce from him, as hereinafter set forth, the said Jo Eisinger had previously, to wit, in 1943, obtained an uncontested absolute divorce from her and thereafter had married the said Lorraine B. Eisinger.

2. Petitioners herein filed joint individual income tax returns for the taxable years 1949 and 1950 on a calendar-year basis with the then Collector of Internal Revenue for the Sixth District of California at Los Angeles, California.

3. In his statutory notice in which he determined the deficiencies in income tax against the petitioners for the years 1949 and 1950 totaling $4,359.34, the following adjustments were made by the respondent:

Adjustment to Net Income
Taxable Year Ended December 31, 1949

Net Income as disclosed by return		$26,176.14
Unallowable deductions and additional income:		
(a) Ordinary income from sale of story "Confidential Squad"	$11,036.68	
(b) Automobile expense disallowed	289.24	
(c) Taxes disallowed	100.00	
(d) Unemployment insurance disallowed	9.00	

(e) Medical expenses disallowed	695.82	
(f) Alimony disallowed	1,925.00	14,055.74
Total		$40,231.88
Reduction of income:		
(g) Long-term capital gain from sale of story "Confidential Squad"		5,141.00
Net income adjusted		$35,090.88

Adjustment to Net Income
Taxable Year Ended December 31, 1950

Net income as disclosed by return	$32,622.33
Unallowable deduction:	
(a) Alimony disallowed	3,364.50
Net income adjusted	$35,986.83

4. Of the above adjustments for the year 1949, petitioners concede all except adjustment (f) "Alimony disallowed—$1,925.00." But petitioners contend, as set forth in their Petition, and respondent concedes, that the amount determined to be additional ordinary income under adjustment (a) in the amount of $11,036.68 is compensation for services rendered for a period of thirty-six months or more within the meaning of Section 107(b) of the Internal Revenue Code.

5. In the determination of the deficiency in income tax against petitioners for the year 1949, petitioners were allowed a total of six exemption credits.

6. The only adjustment resulting in the deficiency against petitioners in income tax for the year 1950, the disallowance of an alimony deduction in the amount of $3,364.50, is at issue in this proceeding. In the determination of said deficiency, petitioners are allowed a total of seven exemption credits.

7. The parties hereto expressly stipulate that if respondent is sustained by the Court in his disallowance of the alimony deductions in each of the years 1949 and 1950, petitioners are entitled to two exemption credits in each of the years 1949 and 1950 for the two children of petitioner Jo Eisinger by his former marriage with Wilhelmine Eisinger. Likewise, it is stipulated and agreed that if respondent's determination in this respect is not sustained by the Court, then petitioners are not entitled to these two exemptions for the taxable years 1949 and 1950.

8. Wilhelmine Eisinger instituted a suit for absolute divorce from the said Jo Eisinger in the Circuit Court of Dade County, Florida, in 1949, and on May 26, 1949, the final decree of divorce was entered, a copy of said decree being attached hereto as Exhibit 1A. At the time of the granting of the decree of absolute divorce to the said Wilhelmine Eisinger, on May 26, 1949, she and petitioner, Jo Eisinger, were the parents of two minor sons, Carl and Lloyd, who are and were the children referred to in the copy of said final decree of divorce.

9. In connection with the said suit for divorce the parties thereto entered into a written property

settlement agreement dated March 28, 1949, which subsequently was modified by a written agreement dated May 19, 1949. Said original agreement and said modification thereof were incorporated in said final decree of divorce and are embodied in Exhibit 1A, attached hereto. The provisions made thereby for payments to Wilhelmine Eisinger by Jo Eisinger form the basis of the contentions of petitioners herein which relate to disallowance of portions of the said payments made in the calendar years 1949 and 1950 by the respondent on the grounds that so much of the payments as were disallowed do not represent payments of alimony, but are payments for the support and maintenance of the minor children. The parties hereto stipulate and agree that the payments set forth as having been made by Jo Eisinger to Wilhelmine Eisinger pursuant to said written agreements and said judgment in the calendar years 1949 and 1950 were actually made in such years by said Jo Eisinger.

10. The determination of whether the payments in question were alimony payments or payments for the support and maintenance of the minor children is the only issue for the Court to resolve.

11. Inasmuch as it is agreed between the parties hereto that section 107(b) of the Internal Revenue Code is applicable to the proceeds received by Jo Eisinger on the sale of his story, "Confidential Squad," the petitioners are entitled to make a computation to determine whether they are entitled to any relief as a result of its application. Such

computations will be made under Rule 50 of the Court's Rules of Practice. For the purposes of making said computations the parties agree that the artistic work was commenced some time in 1945, was completed on or about January 7, 1949, and was sold on September 25, 1949, on which date Jo Eisinger received the sale price, and that all of the proceeds of the sale were received in the calendar year 1949.

12. There is attached hereto as Exhibit 2B a true and correct copy of the Income Tax Return of petitioners for the year 1946 which the parties agree reflects the net income for the purposes of computation of the possible tax benefit under Section 107(b).

13. There is attached hereto as Exhibit 3C a true and correct copy of the Income Tax Return of petitioners for the year 1947 which the parties agree reflects the net income for the purposes of computation of the possible tax benefit under Section 107(b).

14. There is attached hereto as Exhibit 4D a true and correct copy of the Income Tax Return of petitioners for the year 1948 which the parties agree reflects the net income for the purposes of computation of the possible tax benefit under Section 107(b).

Dated at Los Angeles, California, July 16, 1954.

/s/ DANIEL A. TAYLOR, E.C.C.
Chief Counsel, Internal Revenue Service, Counsel for Respondent.

/s/ AARON B. ROSENTHAL,
Counsel for Petitioners.

EXHIBIT 1A

[Ex. 1A attached to the above is identical to Ex. B attached to the Petition, pages 18 to 33 of this printed record.]

Filed August 13, 1954, T.C.U.S.

[Title of Tax Court and Cause.]

MEMORANDUM OPINION

LeMire, Judge:

Respondent determined deficiencies in petitioners' income tax for 1949 and 1950 in the respective amounts of $3,433.58 and $925.76.

The sole question presented is whether the respondent erred in determining that a portion of the payments made by Jo Eisinger to his former wife pursuant to a decree of divorce were for the support of his minor children and are not deductible under the provisions of sections 23(k) and (u) of the Internal Revenue Code of 1939.

All of the facts are stipulated.

Petitioners, Jo Eisinger and Loraine B. Eisinger, during the years involved were husband and wife and filed a joint return for the respective periods in question with the Collector of Internal Revenue for the Sixth District of California at Los Angeles. Since Loraine B. Eisinger is involved solely by virtue of filing a joint return, Jo Eisinger will hereinafter be referred to as petitioner.

Pursuant to a decree granted May 26, 1949, by the Circuit Court of Dade County, Florida, the marriage of petitioner to Wilhelmine Eisinger was dissolved. At that time they were the parents of two minor sons, Carl and Lloyd, 16 and 10 years of age, respectively.

A written property settlement agreement dated March 28, 1949, and modified on May 19, 1949, was incorporated in the decree of divorce. The pertinent part of the agreement reads as follows:

4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida, and in and for Dade County, in Chancery, No. 112550-C, and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage until such child shall attain the age of twenty-one (21) years, at which

time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week, during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 Dollars ($62.50) per week.

* * *

6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. * * *

In his deficiency notice the respondent disallowed the sum of $1,925 in 1949 and the sum of $3,364.50 in 1950 of the total amounts claimed as deductions

for alimony payment to petitioner's former wife upon the grounds that such amounts were paid for the support of his minor children.

It is the petitioner's position that the separation agreement provides for the payment of a lump sum to his former wife without specifying the amount to be applied for the support of the children. It is argued that although the agreement provides for the reduction of the total amount payable to the wife by fixed amounts under certain contingencies, until such contingencies arise there is no way of determining what part of the lump sum is for the support of the children, and the rationale of the cases of Dora H. Moitoret, 7 T. C. 640, and Henrietta S. Seltzer, 22 T. C. 203, is applicable here.

The respondent contends that the agreement must be construed in its entirety, and when so considered it is clear that one-half the amount to be paid to the wife represents an amount fixed as payments for the support of the minor children.

It has been repeatedly held that an adequate consideration of the problem presented requires a construction of the agreement as a whole. Robert W. Budd, 7 T. C. 413, aff'd per curiam, 177 F. 2d 198; Warren Leslie, Jr., 10 T. C. 807; Mandel vs. Commissioner, 185 F. 2d 50, affirming a memorandum opinion of this court.

On this record, we hold that the amount for the support of the children is identifiable, and the cases

relied upon by the petitioner are factually distinguishable. It follows that the determination of the respondent on this issue must be sustained.

Effect will be given to the other adjustments as stipulated by the parties.

Decision will be entered under Rule 50.

Received February 23, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached computation reflecting deficiencies in income tax in the amount of $2,458.22 for the taxable year 1949, and $925.76 for the taxable year 1950, respectively, is submitted on behalf of the respondent in compliance with the opinion of the Court determining the issues in this proceeding.

The computation is submitted without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court pursuant to the statute in such cases made and provided.

/s/ JOHN POTTS BARNES, R.E.M.
Chief Counsel, Internal
Revenue Service.

With prejudice to the right of appeal, it is agreed that the attached computation is in accordance with the opinion of the Tax Court in the above-entitled proceeding.

/s/ NORMAN GOODMAN,
Counsel for Petitioner.

Ap:LA:AA-EWM

Recomputation Statement

In re: Jo Eisinger and Loraine B. Eisinger
c/o Aaron B. Rosenthal
416 West 8th Street, Suite 1009-16
Los Angeles 14, California

Docket No. 47871

Year		Deficiency
1949	Income Tax	$ 2,458.22
1950	Income Tax	925.76
	Total	$3,383.98

Recomputation of tax liability has been prepared in accordance with the memorandum opinion of The Tax Court of the United States, filed February 29, 1956.

Year 1949

Adjustments to Net Income

Net income as disclosed by the deficiency notice dated January 29, 1953		$35,090.88
Nontaxable income and additional deductions:		
(a) Adjustment of income from sale of story "Confidential Squad"	$11,036.68	
(b) Adjustment of deduction for medical expense	551.81	11,588.49
Net income as adjusted, based on the memorandum opinion of The Tax Court of the United States, filed February 29, 1956, and Stipulation of Facts between the parties		$23,502.39

Explanation of Adjustments

(a) Net income is decreased $11,036.68, as a result of determination that proceeds of $11,036.68 received in the year 1949 from the sale of story, "Confidential Squad" represents Section 107 income to be allocated over the 36 months period January 1, 1946, through December 31, 1948. Computation of adjustment is as follows:

Proceeds from sale of story received in the year 1949		$11,036.68
Allocation of proceeds over 36 months period:		
Year 1946—12 months	$ 3,678.80	
Year 1947—12 months	3,678.89	
Year 1948—12 months	3,678.89	
Total		$11,036.68
Ordinary income from sale of story as shown by the deficiency notice		$11,036.68
Portion of Section 107 income received during the year 1949		None
Decrease in net income		$11,036.68

(b) Net income is decreased $551.81, representing adjustment in allowable deduction for medical expenses, computed as follows:

Total medical expenses		$ 3,937.91
Adjusted gross income as shown by the deficiency notice	$47,535.74	
Deduct:		
Section 107 income received from sale of story held to be income for the years 1946, 1947 and 1948	11,036.68	
Adjusted gross income as revised	$36,499.06	
5% of adjusted gross income as revised		1,824.95
Allowable deduction for medical expenses		$ 2,112.96
Deduction for medical expense allowed in the deficiency notice		1,561.15
Decrease in net income		$ 551.81

Computation of Tax

		Tax at Ordinary Rates		Alternative Tax
Net income		$23,502.39		$23,502.39
Less: Excess of net long-term capital gain over net short-term capital loss				125.00
Ordinary net income				$23,377.39
Less: Exemptions		3,600.00		3,600.00
Income subject to tentative tax		$19,902.39		$19,777.39
One-half of income subject to tentative tax		$ 9,951.20		$ 9,888.69
Tentative tax		$ 2,623.41		$ 2,602.15
Less:				
17% on $ 400.00	$ 68.00		$ 68.00	
12% on $2,223.41	266.81		—	
12% on $2,202.15	—	334.81	264.26	332.26
Balance		$ 2,288.60		$ 2,269.89
Total income tax—twice the above balance		$ 4,577.20		$ 4,539.78
Add: 50% of excess of net long-term capital gain over net short-term capital loss		—		62.50
Tax at ordinary rates (lesser tax)		$ 4,577.20		—
Alternative tax				$ 4,602.28
Income tax				$ 4,577.20
Add: Total increase in tax for the years 1946, 1947 and 1948 resulting from the treatment of income from the sale of story as Section 107 income, see Ex. A				3,348.86
Income tax liability				$ 7,926.06
Income tax liability disclosed by the return, Account No. 3250307, 6th California District				5,467.86
Deficiency in income tax				$ 2,458.20

Year 1950

Net income as disclosed by the deficiency notice dated January 29, 1953	$35,986.83
As adjusted, based on the memorandum opinion of The Tax Court of the United States, filed February 29, 1956, and Stipulation of Facts between the parties	No Change
Income tax liability (No Change)	$ 9,340.84
Income tax liability disclosed by the return, Account No. 3259637, 6th California District	8,415.08
Deficiency in income tax	$ 925.76

EXHIBIT A

Computation of tax for the years 1946, 1947 and 1948 under the provisions of Section 107 of the Internal Revenue Code on proceeds of $11,036.68 received by Jo Eisinger on the sale of his story "Confidential Squad" on September 25, 1949.

Proceeds received in year 1949 from sale of story.....		$11,036.68
Allocated over 36 months period:		
Year 1948—12 months.....	$ 3,678.89	
Year 1947—12 months.....	3,678.89	
Year 1946—12 months.....	3,678.90	
Total	$11,036.68	

	Year 1948		Year 1947		Year 1946	
	Jo Eisinger	Loraine B. Eisinger	Jo Eisinger	Loraine B. Eisinger	Jo Eisinger and Loraine B. Eisinger	Total
Total net income as shown by the returns.....	$18,591.03		$17,881.00		$12,888.36	
Add:						
Section 107 net income....	3,678.90		3,678.89		3,678.89	
Adjustment of deduction for medical expense	—		—		183.95	
Net income as revised.....	$22,269.93		$21,559.89		$16,751.20	

Each petitioner's community one-half	$11,134.97	$11,134.96	$10,779.95	$10,779.94	—	
Less: Exemption	1,000.00	1,000.00	1,000.00	1,000.00	$ 2,400.00	
Balance subject to tax	$10,134.97	$10,134.96	$ 9,779.95	$ 9,779.94	$14,351.20	
One-half	—		—		7,175.60	
Tax	2,691.29	2,691.29	2,565.18	2,565.18	1,712.68	
Less: 5%	134.56	134.56	128.26	128.26	—	
17% on $ 400.00	—	—	—	—	68.00	
12% on $1,312.68	—	—	—	—	157.52	
					$ 225.52	
Balance	$ 2,556.73	$ 2,556.73	$ 2,436.92	$ 2,436 92	$ 1,487.16	
Twice above balance	—	—	—	—	$ 2,974.32	
Income tax liability	$ 2,556.73	$ 2,556.73	$ 2,436.92	$ 2,436.92	$ 2,974.32	
Income tax liability disclosed by the return	1,957.46	1,957.46	1,845.04	1,845.04	2,007.74	
Increase in tax attributable to Section 107 income	$ 599.27	$ 599.27	$ 591.88	$ 591.88	$ 966.58	$3,348.88

Filed June 12, 1956, T.C.U.S.

The Tax Court of the United States
Washington

Docket No. 47871

JO EISINGER and LORAINE B. EISINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant to the Court's Memorandum Opinion, filed February 29, 1956, the respondent filed a computation which the petitioners agree is in accordance with the opinion. Therefore, it is

Ordered and Decided: That there are deficiencies in income tax of $2,458.22 and $925.76 for the taxable years 1949 and 1950, respectively.

Entered June 13, 1956.

[Seal] /s/ C. P. LeMIRE,
Judge.

Served June 14, 1956.

Entered June 14, 1956.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 47871

JO EISINGER and LORAINE B. EISINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REVIEW

Taxpayers, the petitioners in this cause, by Jerome B. Rosenthal, Samuel P. Norton and Norman Goodman, counsel hereby file their petition for a review by the United States Court of Appeals for the Ninth Circuit of the decision by the Tax Court of the United States rendered on June 13, 1956, determining deficiencies in the petitioners' Federal Income Taxes for the calendar years 1949 and 1950, in the respective amounts of $2,458.22 and $925.76, and respectfully show:

I.

The petitioners, Jo Eisinger and Loraine B. Eisinger, are individuals, husband and wife, with their present residence at 9301 Flicker Way, Los Angeles, California. The income tax returns for the period here involved were filed with the Collector of Internal Revenue for the Los Angeles District of California.

II.

Nature of the Controversy

The controversy involves the proper determination of petitioners' liability for Federal Income Taxes for the calendar years 1949 and 1950.

On March 28, 1949, Jo Eisinger and his former wife, Wilhelmine Eisinger, entered into a written property settlement agreement. On April 29, 1949, this property settlement agreement was amended. The agreement, as amended, was incorporated in a final decree entered in the divorce action on May 26, 1949. Said property settlement agreement provides that Jo Eisinger agrees to pay to Wilhelmine Eisinger a stipulated sum per week.

On their 1949 and 1950 income tax returns, petitioners deducted the amounts of $3,850.00 and $6,677.00, respectively, as alimony paid to Wilhelmine Eisinger pursuant to said property settlement agreement. The Commissioner of Internal Revenue erroneously determined that of such payments, the amounts $1,925.00 and $3,364.50 represented payment for the support of Jo Eisinger's two minor sons for the years 1949 and 1950, respectively.

III.

The said petitioners, being aggrieved by the findings of fact and conclusions of law contained in the said findings and opinion of the Court, and by its decision entered pursuant thereto, desire to obtain

a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ JEROME B. ROSENTHAL.

Duly verified.

Received and filed September 10, 1956, T.C.U.S.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 47871

JO EISINGER and LORAINE B. EISINGER,

Petitioners on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent on Review.

NOTICE OF FILING PETITION FOR REVIEW

To: John Potts Barnes, Chief Counsel, Internal Revenue Service.

You are hereby notified that the above-named petitioners did, on the 10th day of September, 1956, file with the Clerk of The Tax Court of the United States, at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit, of the decision of this Court hereto-

fore rendered in the above-entitled case. Copy of the petition for review as filed is hereto attached and served upon you.

Dated this 10th day of September, 1956.

/s/ HOWARD P. LOCKE,
Clerk, The Tax Court of the United States.

Service of copy acknowledged.

Filed September 10, 1956, T.C.U.S.

[Title of Court of Appeals and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To: Chief Counsel, Internal Revenue Service, Washington, D. C.

You are hereby notified that the petitioners on the 7th day of September, 1956, filed with the Clerk of the Tax Court of the United States at Washington, D. C., a petition for review by the United States Court of Appeals for the Ninth Circuit of the decision of the Tax Court of the United States heretofore rendered in the above-entitled cause. A copy of the petition for review is hereto attached and served upon you.

Dated at Beverly Hills, California, this 7th day of September, 1956.

Respectfully,

/s/ JEROME B. ROSENTHAL.

/s/ SAMUEL P. NORTON,

/s/ NORMAN GOODMAN,
Counsel for Petitioners.

Service of copy acknowledged.

Filed September 11, 1956, T.C.U.S.

[Title of Tax Court and Cause.]

ORDER ENLARGING TIME

For cause, it is

Ordered: That the time for filing the record on review and docketing the petition for review in the United States Court of Appeals for the Ninth Circuit is extended to December 9, 1956.

Dated: Washington, D. C., October 12, 1956.

[Seal] /s/ J. E. MURDOCK,
Judge.

Served October 15, 1956.

Entered October 15, 1956.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 14, inclusive, constitute and are all of the original papers on file in my office, as called for by the "Designation of Contents of Record on Review," including exhibits 1A thru 4D attached to the Stipulation as to Facts, in the case before the Tax Court of the United States docketed at the above number and in which the petitioners in the Tax Court have initiated an appeal as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case, as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of November, 1956.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the
United States.

[Endorsed]: No. 15387. United States Court of Appeals for the Ninth Circuit. Jo Eisinger and Loraine B. Eisinger, Petitioners, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed November 30, 1956.

Docketed: December 17, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, A. D. 1957

No. 764

Jo EISINGER and LORAIN B. EISINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Jo EISINGER and
LORAIN B. EISINGER,

Pro Se.

Of Counsel:

ROSENTHAL & NORTON,
JEROME B. ROSENTHAL and
NORMAN D. ROSE,
250 North Canon Drive,
Beverly Hills, California.

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IN THE

Supreme Court of the United States

October Term, A. D. 1957

No. .....

Jo EISINGER and LORAIN B. EISINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Jo Eisinger and Lorain B. Eisinger respectfully petition this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the Ninth Circuit, rendered in this cause on December 10, 1957. Their petition respectfully shows:

Opinions Below.

(1) The report of the Opinion delivered by the Court of Appeals for the Ninth Circuit has not been published in the official reports as yet, but appears in 1 AFTR 2d 58-321 and 58-1 USTC par. 9132.

A copy of said Opinion is set forth as Appendix "A" hereto.

(2) The report of the Opinion delivered by the Tax Court of the United States [R. 41] does not appear in the official reports but may be found in C. C. H. Dec. 21,599(M); T. C. Memo. 1956 and 1956 P-H T. C. Memorandum Decisions, par. 56,048.

Jurisdiction.

Statement of the ground on which the jurisdiction of the Supreme Court is Invoked:

(1) The judgment of the Court of Appeals for the Ninth Circuit was entered on December 10, 1957, and is set forth as Appendix "B" hereto.

(2) Jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit by writ of certiorari is conferred on this court by Section 1254 of Title 28 of the United States Code.

Question Presented.

Whether under the provisions of the 1939 Internal Revenue Code, Sections 22(k) and 23(u), a husband in determining his net taxable income may deduct payments made by him to a former wife pursuant to a written agreement incorporated into a decree of divorce which

(1) designates the payments as being for the support of the wife,

(2) provides that in consideration of the payments being made, the wife agrees to support their minor children,

(3) nowhere makes definite or assigns precisely the amount or portion of the payments for the benefit of the children,

(4) nowhere restricts the use of any sum or portion to the support of the minor children, and

(5) nowhere expressly provides any sum as "payable for the support of the minor children."

Statutes and Regulations Involved.

(1) Internal Revenue Code of 1939:

Sec. 22. GROSS INCOME.

* * * * * * * *

(k) [As added by Sec. 120(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*— In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payments which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payments to the extent of such sum payable for such support, shall be considered a payment for such support. * * *

(2) Regulation 111, Section 29.22(1)-1.

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—

(a) *In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).

* * * * * * * *

(d) *Payments for support of minor children.*—Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. * * *

(3) 1939 Internal Revenue Code, Sec. 23(u):

Section 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(u) [As added by Sec. 120(b), Revenue Act of 1942, supra] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross

income, no deduction shall be allowed with respect to such payment under this subsection. (26 U. S. C. 1952 ed., Sec. 23.)

(4) Regulation 111, Sec. 29.23(u)-1. *Periodic Alimony Payments.*—A deduction is allowable under Section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under Section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see Section 29.22(k)-1. (For definition of husband and wife in such cases, see Section 3797(a)(17).)

* * * * * * * * *

Statement.

Basis for Jurisdiction.

(1) In the Tax Court of the United States:

Internal Revenue Code, Section 272 (1939 Code) provided in part as follows:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed . . . the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed . . . the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency." (Sec. 6212(a) and Sec. 6213(a) of the 1954 Code are substantially the same as Sec. 272 of the 1939 code.)

Petitioners' petition to the Tax Court of the United States provided in part:

> "2. The notice of deficiency (a copy of which is attached and marked Exhibit 'A') was mailed to the petitioners, care of their attorney, Aaron B. Rosenthal, 416 West Eighth Street, Suite 1009-16, Los Angeles 14, California, on January 29, 1953." [R. 5.]

The petition to the Tax Court for redetermination of the deficiency was filed by petitioners on April 17, 1953, that is, within ninety (90) days of mailing of the notice of deficiency [see Docket Entries, R. 3].

Therefore, the Tax Court had jurisdiction to determine the petition for redetermination filed by petitioners.

(2) In the United States Court of Appeals for the Ninth Circuit:

Internal Revenue Code, Section 7482 (1954 Code), provides in part as follows:

> "(a) *Jurisdiction.*—The United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. . . ." (Sec. 1141(a) 1939 Code substantially unchanged.)

Internal Revenue Code, Section 7483 (1954 Code) provides in part:

> "The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in Section 7482 if a petition for such review is filed by . . . the taxpayer within 3 months after the decision is rendered." (Sec. 1142 in part, of the 1939 Code, unchanged.)

The returns for the calendar years 1949 and 1950, the years in question, were filed by petitioners with the then Collector of Internal Revenue for the Sixth District of California at Los Angeles, California [see "Petition," R. 5, and "Petition for Review," R. 53].

The United States Court of Appeals for the Ninth Circuit is the Circuit Court in which is located the Los Angeles, California, Office of the then Collector of Internal Revenue (28 U. S. C. A., Sec. 41).

The decision of the Tax Court in *Eisinger et ux. v. Commissioner,* Docket No. 47971 was rendered on June 13, 1956 [see "Decision," R. 52]. The Petition for Review was filed by petitioners in the United States Court of Appeals for the Ninth Circuit on September 10, 1956, which was within three months of rendition of the Tax Court Decision [see "Docket Entries," R. 4].

Therefore, the United States Court of Appeals for the Ninth Circuit had jurisdiction to hear and determine the appeal.

Facts.

In 1949, Wilhelmina Eisinger instituted suit for divorce from petitioner Jo Eisinger. At the time, Jo and Wilhelmina Eisinger were the parents of two minor children. The parties entered into a written property settlement agreement, which was subsequently modified and incorporated into a decree of divorce dated May 26, 1949. The relevant portions thereof are:

1. The husband agreed to pay the wife "by way of alimony" $125.00 per week [R. 28].

2. In consideration for the payment of alimony, the wife agreed to support the minor children [R. 28].

3. If the wife failed to support either or both of the children, the husband could, at his option, pay the cost of their support and deduct the amount he paid from the alimony of $125.00 per week provided for the wife. The instrument placed no limitation on the amount the husband could deduct [R. 28].

4. If the husband were called upon to pay any claim asserted against him by reason of a debt incurred by the wife for any purpose without limitation, he could at his option, stop making the payments of alimony of $125.00 per week until the weekly alimony aggregated the amount of the claim or claims. Again, the instrument placed no limitation on the amount the husband could deduct from each payment provided for [R. 30].

5. The parties expressly incorporated into the agreement their entire understanding. No oral statements nor prior written matter extrinsic to the agreement was to be in force or effect [R. 26].

6. Upon remarriage of the wife, the alimony payments of $125.00 per week were to cease. "In lieu thereof," however, the husband agreed to pay $31.25 per week for support and maintenance of each minor child [R. 28].

7. The payments of alimony of $125.00 per week were to be reduced $31.25 per week upon death or attainment of age 21 by either child [R. 29].

In addition, it should be noted that:

(a) At all times, the agreement refers to the payments to the wife as alimony [R. 19-30].

(b) Nowhere does the agreement provide for any specific sum or portion of the payments made to be applied by the wife for support of the children.

(c) Nowhere does the agreement specifically provide that the payments to be made to the wife were for "support of children" except, in the event of the wife's remarriage, in which case the husband agreed to pay "in lieu of" alimony payments $31.25 per week for support and maintenance of each child [R. 28].

(d) During the years 1949 and 1950, Wilhelmina Eisinger had not remarried, and both children were living and under twenty-one years of age.

Pursuant to the terms of the agreement and decree, Jo Eisinger made payments to Wilhelmina in the sums of $3,850.00 and $6,677.00 for the calendar years 1949 and 1950 respectively and petitioners (Jo Eisinger and his then wife, Lorain B. Eisinger) deducted the full amount of the payments made from gross income as alimony paid on their joint individual income tax returns filed for the subject years. The Commissioner disallowed the sums of $1,925 00 and $3,364.50 for 1949 and 1950 respectively on the ground that part of the payments made was "payable for the support of minor children" within the meaning of Section 22(k) and 23(u) of the 1939 Code.

Petitioners filed a petition for redetermination of the deficiency assessed by the Commissioner. The Tax Court held "that the amount for the support of the children is identifiable" and therefore not deductible.

In their appeal to the Court of Appeals for the Ninth Circuit, petitioners took the position that the agreement did not "fix . . . as a sum which is payable for the support of minor children" any part of the payments made because the agreement neither obligated the wife nor imposed upon her the duty to expend or apply any definite sum or portion of the payments made only for the support

or benefit of the children. The Court of Appeals rejected petitioners' contention and affirmed the Tax Court Decision.

Reasons Relied on for Allowance of the Writ.

The decision of the Court of Appeals for the Ninth Circuit as to the meaning of the words "fix . . . as a sum which is payable for the support of minor children" as used in Section 22(k) of the 1939 Internal Revenue Code is in conflict with the decisions of the Courts of Appeal for the Second and Sixth Circuits.

(1) Petitioners' appeal to the Court of Appeals for the Ninth Circuit sought a reversal of the Tax Court decision primarily upon the ground that the Tax Court had misconstrued the meaning of the words "fix . . . as a sum which is payable for the support of minor children." Petitioners relied on the case of *Weil v. Commissioner*, 240 F. 2d 584 (2nd Cir., 1957), and urged the Ninth Circuit to adopt the rule enunciated in the *Weil* case as to the meaning of the above quoted words. Petitioners contend that *Weil v. Commissioner, supra,* laid down the rule that:

> ". . . sums are payable 'for the support of minor children' when they are to be used for that purpose only. . . . [I]f sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose. . . ." (240 F. 2d 588.)

Nowhere in the agreement between petitioner Jo Eisinger and his former wife was she obligated or required to apply any specific sum or portion of the payments only for the support of the minor children. Therefore the use of such sums was not restricted to "the support of minor

children." Since no part of the payments made by petitioner Jo Eisinger was "payable for the support of minor children," as defined by the *Weil* case, in affirming the Tax Court Decision, the Ninth Circuit in effect rejected the rule there laid down as to the meaning of the statutes in question.

Petitioners are aware that the terms of the agreement in *Weil v. Commissioner, supra,* differ from the terms of the agreement in the instant case. However, the dissimilarity in terms does not alter the conclusion that in neither case did the "decree or written instrument fix . . . a sum which is payable for the support of minor children . . ." under the rule adopted by the Second Circuit in the *Weil* case.

In *Hirschon v. Commissioner,* ..... F. 2d ..... (2nd Cir., 1957), the Second Circuit has reaffirmed the rule it laid down in the *Weil* case. There, on facts similar to *Weil v. Commissioner, supra,* it again reversed the Tax Court and, quoting from its decision in the *Weil* case stated:

> "'The statute taxes to the wife sums which are available for her own use and benefit—whether or not she has undertaken to support the minor children—and does not tax to the wife sums she is required to devote exclusively to the support of the children. What vitiates the decision of the Tax Court in this case is its holding that sums may be 'payable for the support of minor children,' even though the wife may be free to use them for other purposes.'" (..... F. 2d .....)

Eisinger's agreement required him to make certain payments "by way of alimony" to his former wife. She agreed in return to support their two minor children. By the terms of the agreement, all of the payments made to

the wife in the years 1949 and 1950 were available for her own use for any purpose and nowhere was she required to devote any sum "exclusively to the support of the children." It is therefore apparent that the decision of the Court of Appeals in the instant case cannot be reconciled with the rule adopted by the decisions in the Second Circuit.

In addition to being in conflict with the Second Circuit decisions, the Ninth Circuit opinion is also in direct conflict with the recent Sixth Circuit decision in *Deitsch v. Commissioner*, 249 F. 2d 534 (6th Cir., 1957). As in the *Weil, Hirschon* and *Eisinger* cases, in the *Deitsch* case the Tax Court held for the Commissioner. The terms of the *Deitsch* agreement were almost identical to those of the *Eisinger* agreement, in that as in the *Eisinger* case, payment to Deitsch's wife were to be reduced by fixed amounts on death, attainment of a stated age (18), or emancipation of either of the children. Moreover, if any of the above conditions were fulfilled as to each child, payments were to *cease entirely*. Nevertheless, the Sixth Circuit reversed the Tax Court and held that no part of the payments made were "fixed" as "payable for the support of minor children." The court reasoned:

> "The term 'fixed' is not ambiguous. It therefore must be construed in its usual sense of 'to assign precisely; * * * to make definite and settled.' Webster's New International Dictionary, 2nd Edition."
>
> "The provisions of the separation agreement do not 'assign precisely' nor 'make definite' the amount or portion of the periodic payments for the benefit either of the wife, or of the children. . . . The wife was not limited to any particular amount for her

> own maintenance and support and more may have been properly expended for that purpose in 1950 than for the children." (249 F. 2d 536.)

The provisions of the Eisinger agreement neither "assign precisely" nor "make definite" the amount or portion of the periodic payments for the benefit of either the wife or of the minor children. Nor by the terms of the instrument was the wife "limited to any particular amount for her own maintenance and support." Therefore, had the Sixth Circuit's reasoning been adopted, the instant case would have been decided in petitioners' favor. This is made clear by the Court of Appeals for the Ninth Circuit when, in its only reference to the case, it stated, "we disagree with *Deitsch v. Commissioner*. . . ." (..... F. 2d .....)

It is thus apparent that the decision of the Ninth Circuit in the instant case is in conflict with the decisions in two other Circuits, and for this reason petitioners urge this Court to consider the question presented and to rule on the correct meaning and application of the disputed sections of the Internal Revenue Code.

(2) Petitioners contend that the rule adopted in the Second and Sixth Circuits is the correct interpretation of the statutes in question because it gives effect to the clear language used by Congress. On the other hand the rule adopted by the Ninth Circuit (if it be a rule at all) is one which alters the apparent meaning of the words used by Congress.

Unfortunately, the legislative history of the statutes in question is not helpful. One is therefore compelled to determine the meaning intended from the words themselves and the context in which they were used. Section 22(k)

of the 1939 Internal Revenue Code provides that certain periodic payments shall be included in the gross income of a former wife except for ". . . that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." Section 23(u) provides that the husband may deduct any payment made which the wife must include under Section 22(k).

It is to be noted particularly that for the wife to exclude part or all of the periodic payments she receives subsequent to the decree of divorce, there must be an amount of money or portion of the payment fixed "as a sum which is payable for the support of minor children of such husband," and, it must be fixed by "the terms of the decree or written instrument."

Congress could have used the words *earmarked* or *designated* or *apportioned* or *allocated* or *intended* "as a sum which is payable for the support of minor children," or any other word or words which would clearly support the result reached by the Ninth Circuit. In using the words it did, Congress must be taken to have had some purpose.

As the Sixth Circuit reasoned in the *Deitsch* case, the "term 'fixed' . . . must be construed in its usual sense of to assign precisely; * * * to make definite and settled." Therefore, to be "fixed" as payable for support of the children, the instrument must "assign precisely" or "make definite and settled" the amount "payable for the support of the minor children." And, sums are not "payable for the support of minor children" unless the

wife "is required to devote exclusively to the support of the children" some definite sum or part of the payment. (*Weil v. Commissioner*, 240 F. 2d 588.)

It is unreasonable to conclude that Congress intended that the Internal Revenue Service, or a reviewing court should be compelled to speculate on the subjective intent of the parties not clearly expressed in the agreement. Yet under the Ninth Circuit's interpretation of the statutes, that is the natural result as is clearly illustrated by the reasoning of the Court of Appeals in its opinion. (..... F. 2d .....; Appendix "A" p. 9.)

In addition to the fact that the meaning ascribed to Section 22(k) by the Second and Sixth Circuits is the one more likely intended by Congress, it is also preferable to the one adopted by the Ninth Circuit because it is easier to apply, and creates certainty and therefore less litigation rather than confusion. Under it, the only test the taxpayer, the Commissioner or a Court need apply in determining whether it is proper to deduct from gross income payments made to a former wife, is whether the decree or instrument expressly designates some sum as "payable for the support of minor children" or, whether under its terms some sum or portion of the payments made is expressly designated as being only for the benefit of the children.

In its decision, the Ninth Circuit stated:

> "The general rule which we here approve is that when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the support of children*, with sufficient certainty and specificity to readily determine which is which, without reference to contingencies

> which may never come into being, then the 'part of any periodic payment' has been fixed 'by the terms of the decree or written instrument' and satisfies the statutes and regulations hereinbefore quoted." (..... F. 2d .....; Appendix "A", pp. 9-10.)

It is submitted that under this so-called "general rule," each case is made to depend on a minute examination of the terms of the agreement in an effort to determine the subjective intent of the parties thereto. Moreover, the taxpayer, the Internal Revenue Service and the Court are without specific guide posts to assist them in deciding whether any part of the payments made may be deducted by the husband. *Query* when a "settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the support of children,* with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come into being?"

That the question here presented is important to a great many taxpayers is adequately illustrated by the great number of cases litigating the correct way to treat payments made to a former wife pursuant to a written instrument or decree of divorce. The Commissioner's brief in the Court of Appeals alone cited the following sixteen Tax Court cases involving this question.

> *Ball v. Commissioner,* decided April 13, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55,-084);
>
> *Budd v. Commissioner,* 7 T. C. 413;
>
> *Chapin v. Commissioner,* decided July 28, 1957 (1947 P-H T. C. Memorandum Decisions, par. 47,224);

Fisher v. Commissioner, decided April 30, 1956 (1956 P-H T. C. Memorandum Decisions par. 56,098);

Fleming v. Commissioner, 14 T. C. 1308;

Gantz v. Commissioner, 23 T. C. 576;

Hicks v. Commissioner, decided June 19, 1953 (1953 P-H T. C. Memorandum Decisions par. 53,216);

Leslie v. Commissioner, 10 T. C. 807;

Mackay v. Commissioner, decided May 6, 1949 (1949 P-H T. C. Memorandum Decisions par. 49,105);

Moitoret v. Commissioner, 7 T. C. 640;

Morsman v. Commissioner, 27 T. C. 520;

Neuwahl v. Commissioner, decided February 19, 1951 (1951 P-H T. C. Memorandum Decisions par. 51,045);

Seltzer v. Commissioner, 22 T. C. 203;

Swallen v. Commissioner, decided May 22, 1951 (1951 P-H T. C. Memorandum Decisions par. 51,149).

Other Tax Court cases not cited by the Commissioner, involving this question are:

Joslyn v. Commissioner, 23 T. C. 126;

Weil v. Commissioner, 22 T. C. 612;

Deitsch v. Commissioner, 26 T. C. 751;

Hirschon v. Commissioner, 27 T. C. No. 62 (1957);

Eisinger v. Commissioner, decided June 13, 1956 (1956 P-H T. C. Memorandum Decisions par. 56,048).

In the following seven of the above twenty-one Tax Court cases, appeals were taken to the Courts of Appeals:

Budd v. Commissioner, 177 F. 2d 198 (6th Cir., 1947);

Deitsch v. Commissioner, 249 F. 2d 534 (6th Cir., 1957);

Eisinger v. Commissioner, ... F. 2d ..... (9th Cir., 1957);

Hirschon v. Commissioner, ... F. 2d ..... (2nd Cir., 1957);

Joslyn v. Commissioner, 230 F. 2d 871 (7th Cir., 1956);

Mandel v. Commissioner, 185 F. 2d 50 (7th Cir., 1950);

Weil v. Commissioner, 240 F. 2d 584 (2nd Cir., 1957), *cert. denied*, May 13, 1957.

Petitioners submit that unless a uniform rule is adopted by this Court, the great number of cases litigating the interpretation of separation agreements which provide payments for support of both the wife and minor children will continue, if not increase, both in those circuits where the Court of Appeals has not as yet been called upon to decide this question, and in those jurisdictions where, as in the Ninth Circuit, a rule is adopted which makes each case depend upon a determination of the subjective intent of the parties thereto from the wording of the agreement. The Court need only consider the increasingly great number of divorces granted annually in the United States wherein minor children are involved.

In addition, although it arises under the 1939 Internal Revenue Code, the question presented in this case is a continuing one, since the Sections here under consideration have been retained, substantially unchanged as Sections 71(a) and 71(b) of the 1954 Internal Revenue Code.

Conclusion.

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

Dated: January 30, 1958.

Jo EISINGER and

LORAIN B. EISINGER,

Petitioners
Pro Se.

Of Counsel:

ROSENTHAL & NORTON,
JEROME B. ROSENTHAL and
NORMAN D. ROSE.

APPENDIX "A."

Opinion for the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Jo Eisinger and Lorain B. Eisinger, Appellants, vs. Commissioner of Internal Revenue, Appellee. No. 15,387. Dec. 10, 1957.

On Petition for Review of the Decision of the Tax Court of the United States.

Before: Lemmon and Barnes, Circuit Judges; and Yankwich, District Judge.

BARNES, Circuit Judge:

This is a timely appeal or petition to review from a decision of the Tax Court. The original jurisdiction of the Tax Court (Int. Rev. Code of 1939, Section 272)[1] and of this court on review (Int. Rev. Code of 1939, Section 1141(a) and Section 1142)[2] is not in issue.

Jo and Lorain Eisinger, husband and wife, seek to deduct from their joint income tax return for the years 1949 and 1950 the total payments made by Jo Eisinger to his former wife, Wilhelmina Eisinger, in accordance with the terms of a certain property settlement agreement, dated March 28, 1949, and amended April 28, 1949, incorporated into the terms of a decree of divorce, obtained in Florida on May 26, 1949, dissolving the marriage of Jo and Wilhelmina Eisinger. At the time of the divorce there were two children, the issue of said marriage, both minors.

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[1]1954 Internal Revenue Code, Sec. 6212(a) and Sec. 6213(a).

[2]1954 Internal Revenue Code, Sec. 7482-3.

Taxpayers deducted the sums of $3,850 and $6,677, respectively, from their gross income for the two years. The Commissioner of Internal Revenue determined that of such sums, fifty per cent, or $1,975 and $3,364.50, respectively, represented payments for the support of the two minor children, and hence were not deductible.

Petitioners claimed the entire sums were periodic payments which Jo Eisinger was obligated to make pursuant to an agreement incident to a decree of divorce, as contemplated by Section 22(k) of the 1939 Internal Revenue Code, and hence properly deductible under Section 23 of said Code.

Internal Revenue Code, Section 22(k) reads in material part as follows:

> "(when) a wife . . . is divorced . . . from her husband under a decree of divorce . . . , periodic payments . . . received subsequent to such decree in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce . . . shall be includible in the gross income of such wife. . . . This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband."

Section 23 provides:

> "In computing net income there shall be allowed as deductions: . . . (u) . . . In the case of a husband described in Section 22(k), amounts includ-

ible under Section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. . . ."

Under the Code, only where payments made by the husband to the wife qualify for inclusion in the wife's income under Section 22(k), may the husband deduct such payments under Section 23(u). Therefore, where payments made are "payable for the support of minor children," within the meaning of Section 22(k), they may not be deducted by the husband.[3]

The Property Settlement Agreement provides that the wife should have custody of the two minor children, and states:

"4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida . . . and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon

---

[3]Relevant portions of Regulations to the Code of 1939 are Regulations 111, Sec. 29, 22(k)-1, which repeats the Code Section and then adds:

"If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in Section 22(k)."

the death of the Husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the Husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 Dollars ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 ($62.50) per week.

6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. . . ."

Briefly stated, appellants maintain that by the agreement, "no specific designation of a sum payable for support of the minor children" was made; hence the whole sum paid can be deducted by him. The Commissioner maintained, and the Tax Court supported his decision, that construing the agreement in its entirety, "the amount for the support of the children is identifiable," and hence is sufficiently specifically designated so as to satisfy the statute and regulations which prohibit such sum identifiably designated as payable for support of children from being deductible by the husband.

Appellants rely largely on a recent decision by Judge Medina in the Second Circuit, *Weil v. Commissioner*, 240 F. 2d 584 (1957).

We agree with it, in its application of the law to the facts of that case, but do not find the legal position there taken applicable herein, nor do we agree with the generality of some of its language.

There the Tax Court held that under the terms of the property settlement agreement then before it, there was "fixed" certain sums payable for the support of minor children. Judge Medina, speaking for the Court, disagreed with such an interpretation. We shall first consider what the Second Circuit said about the law applicable and then consider the similarity and differences between the agreement there and here under consideration.

The Court said:

> "The key words of the statute are 'payable for.' The context of Section 22 demonstrates that the Congress used this phrase advisedly. The wife is not relieved of taxability on sums which she in fact expends for the support of minor children, but only on such sums as 'the terms of the * * * instrument

fix * * * as * * * payable for' that purpose. The statute taxes to the wife sums which are available for her own use or benefit—whether or not she has undertaken to support the minor children—and does not tax to the wife sums she is required to devote exclusively to the support of the children. What vitiates the decision of the Tax Court in this case is its holding that sums may be 'payable for the support of minor children,' even though the wife may be free to use them for other purposes.

Despite two decisions seemingly to the contrary, Henrietta S. Seltzer, 22 T. C. 203, and Dorothy Newcombe, 10 T. C. M. 152, affirmed on another point, 9 Cir., 203 F. 2d 128, the Tax Court has, in a series of cases culminating in the case at bar, adopted the position that it is enough if anywhere in the instrument there is mentioned a sum thought to be appropriate for the support of minor children under some circumstances.

* * *

We hold that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein. This cannot be the case if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children. The fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband.

* * *

We agree with the statement of the Commissioner in his brief that in order to sustain the determination of the Tax Court it is necessary to find in the agreement 'sufficient provisions showing an intention on the part of Charles Weil to provide for his minor children specifically, as distinct from an intention to provide for his former wife and have her in turn provide for the children.' But we are conviced that the agreement contains no such provisions. It is quite true that the agreement must be read as a whole, Mandel v. Commissioner, 7 Cir., 185 F. 2d 50; Budd v. Commissioner, 6 Cir., 177 F. 2d 198, and that no particular formula, such as the phraseology we have quoted from Section 22(k), is necessary. This particular instrument, however, must be construed as expressing the husband's intention to make payments to the wife and have her support the children, the very converse of what the Commissioner states is necessary to support the orders of the Tax Court in these cases." 240 F. 2d 584, 587-588.

In describing the property settlement agreement in the *Weil* case, the court points out that from one periodic payment to be made to the wife, she was to support, maintain and educate the children and herself.

"Except in the remarriage clause the agreement nowhere requires the wife to devote any specified amount to the support of the children, nor unless she remarries, are the payments to her to be reduced if it becomes no longer necessary for her to support either or both of the children." 240 F. 2d 584, at 588.

To the contrary the contract there interpreted specifically provided that payments to the wife should not be

revised, even though one or both children died, or became of age, or because either failed to longer live with their mother.

It is true that if the wife *remarried*, then by the terms of the Weil agreement, during each child's life before majority while living with their mother, the father agreed to pay $200.00 per child to the mother. This was the only contingency mentioned by reason of which any specification of amounts for child support could be ascertained. The reliance on this contingency, which might never occur, caused the Second Circuit to refer to the Tax Court's "fine tooth combing" endeavors.

In contrast, we here have an agreement in which the Commissioner properly emphasized the following facts, none of which existed in the *Weil* case:

(a) If the wife did not remarry, the original $125.00 per week payments were to be reduced by $31.25 as each child reached majority.

(b) "It is the intention of the parties that when both of said children shall have attained the age of 21," the husband shall pay alimony of $62.50 per week.

(c) Payments were to be reduced by $31.25 per week upon the death of either child prior to his majority.

(d) "If the wife shall fail to support either or both of said children, the husband may pay the cost thereof and deduct the same from said weekly alimony."

(e) Upon remarriage of the wife, "all alimony payments to her shall lease, but in lieu thereof the husband shall pay $31.25 for the support and maintenance of each child . . . until such child shall attain the age of 21."

The husband, when he entered into this agreement, had a moral and legal duty to (a) pay his wife alimony, and (b) support his minor children. He recognized that duty, and entered into the property settlement agreement. By the language used, he arranged to pay his wife alimony, and have her support herself and the children. Can there be any doubt that in setting the various figures used therein—($125.00, $62.50 and $31.25)—each of the parties had in mind they were agreeing the wife would need and have $62.50 per week, and each child $31.25? We recognize that the Internal Revenue Laws uses the language "payable for," and does not concern itself with whether the children receive any precise amount of support, or any support. But these parties did concern themselves. The husband saw to it that if the wife failed to use "her" support money for the support of the children, the husband could pay to the children, or for them, and deduct such amounts from the wife's "alimony payments." Ths was a laudable agreement on the part of both for the benefit of their children. It establishes conclusively in our mind how the parties regarded the payments. Suppose, in full accordance with the terms of his property settlement agreement, the husband had deducted from his payments of alimony to his wife $62.50 per week, and expended that sum directly for the benefit of his children, over a period of years. Would anyone suggest his wife could recover the full $125.00 per week as her alimony, or that the husband would in any way be in contempt of the Florida court decree?

The general rule which we here approve is that when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the*

support of children, with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come into being, then the "part of any periodic payment" has been fixed "by the terms of the decree or written instrument" and satisfies the statutes and regulations hereinbefore quoted. *Joslyn v. C. I. R.,* 7 Cir., 230 F. 2d 871 (1956); *Mandel v. C. I. R.,* 7 Cir., 185 F. 2d 50 (1950); *Budd v. C. I. R.,* 6 Cir., 177 F. 2d 198 (1947), affirming per curiam, 7 T. C. 413 (1946); *Morsman v. Commissioner,* 27 T. C. 520 (1956); U. S. Treas. Reg. 111, Section 29.23(u)-1 (1939). We disagree with *Deitsch v. Commr.,* 6 Cir., 26 Law Week 2265; ..... F. 2d. .....

Under this general rule, the trier of fact does not rely on "[T]he fortuitous or incidental mention of a figure in a provision meant to be inoperative unless some more or less probable future event occurs, (which) will not suffice to shift the tax burden from the wife to the husband." (*Weil v. Commissioner, supra.*) Neither should a strained or unnatural construction be allowed to shift the tax burden from the husband to the former wife.

The decision of the Tax Cort is *Affirmed.*

(Endorsed:) Opinion. Filed Dec. 10, 1957.

Paul P. O'Brien, Clerk.

APPENDIX "B."

Judgment.

United States Court of Appeals for the Ninth Circuit.

Joe (*sic*) Eisinger and Lorain B. Eisinger, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 15387.

Upon petition to review a Decision of the Tax Court of the United States.

This cause came on to be heard on the Transcript of the Record from the Tax Court of the United States, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the said Tax Court of the United States in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered December 10, 1957. Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 764

JO EISINGER AND LORAIN B. EISINGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 41–45) is not officially reported. The opinion of the Court of Appeals (Pet.–A 1–10)[1] is reported at 250 F. 2d 303.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1957. (Pet.–B 11.) The petition for a writ of certiorari was filed on February 3, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

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[1] "Pet.–A" and "Pet.–B" references are to the pages of Appendices A and B, respectively, to the petition for certiorari filed with this Court.

QUESTION PRESENTED

Whether the courts below properly construed the particular terms of a property settlement agreement incorporated in a divorce decree as fixing a portion of periodic payments to be made by the taxpayer-husband as a sum payable for support of his minor children within the meaning of Section 22 (k) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * *

(k) [As added by Sec. 120 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment,

as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. * * *
(26 U. S. C. 1952 ed., Sec. 22 (k).)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(u) [As added by Sec. 120 (b), Revenue Act of 1942, *supra*] *Alimony, Etc., Payments.*—In the case of a husband described in section 22 (k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22 (k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.
(26 U. S. C. 1952 ed., Sec. 23 (u).)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22 (k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(*a*) *In general.*—Section 22 (k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a

court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797 (a) (17).

* * * * *

(d) *Payments for support of minor children.*—Section 22 (k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22 (k), is specifically designated as a sum payable for the support of minor children of the husband. * * *

Sec. 29.23 (u)–1. *Periodic Alimony Payments.*—A deduction is allowable under section 23 (u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under section 22 (k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see section 29.22 (k)–1. (For definition of husband and wife in such cases, see section 3797 (a) (17).)

* * * * *

STATEMENT

The facts as stipulated (R. 35–40) and as found by the Tax Court (R. 41–44) may be summarized as follows:

Pursuant to a decree granted May 26, 1949, by the Circuit Court of Dade County, Florida, the marriage

of the taxpayer[2] to Wilhelmine Eisinger was dissolved. At that time they were the parents of two minor sons, Carl and Lloyd, sixteen and ten years of age, respectively. (R. 42.)

A written property settlement agreement dated March 28, 1949, and modified on May 19, 1949, was incorporated in the decree of divorce. (R. 42.) The agreement read, in pertinent part, as follows (R. 42–43):

> 4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida, and in and for Dade County, in Chancery, No. 112550–C, and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon the death of the Husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage

[2] Lorain B. Eisinger, the present wife of Jo Eisinger, is involved solely because of the filing of joint returns for the taxable years. Jo Eisinger is referred to, individually, as the taxpayer.

until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week, during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the Husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 Dollars ($62.50) per week.

* * * * *

6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. * * *

The Commissioner disallowed the sum of $1,925 in 1949 and the sum of $3,364.50 in 1950 of the total

amounts claimed as deductions for alimony payments by the taxpayer on the ground that such amounts were paid for the support of his minor children. (R. 43–44.)

The Tax Court (R. 41–45) and the Court of Appeals (Pet.-A 1–10) affirmed the Commissioner's determination.

ARGUMENT

1. The decision of the court below, affirming the decision of the Tax Court, is clearly correct. Section 23 (u) of the Internal Revenue Code of 1939, *supra*, p. 3, provides that a husband who is divorced or legally separated from his wife may deduct, in computing his net income, payments made by him to his wife which are *includible* in her gross income under Section 22 (k) of the 1939 Code, *supra*, pp 2–3. So far as here pertinent, Section 22 (k) provides that a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance shall include in her gross income periodic payments received subsequent to such decree. Section 22 (k) excludes, however, from that which the wife is required to include in her gross income the part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money, as payable for the support of minor children of the husband.

Congress intended, in enacting Sections 22 (k) and 23 (u), to tax the wife on the amount of money given her and, to that extent, permit deduction thereof by the husband. Where, however, minor children are

involved, Congress did not require the wife to include in her gross income amounts allocated by the parties for the support of their minor children, and amounts not included in her income may not be deducted by the husband.[3]

Whether or not a particular instrument fixes a portion of the amounts payable by the husband to the wife as payable for the support of the minor children within the meaning of Section 22 (k) necessarily depends upon the particular terms of the agreement. Certainly this is not a question appropriate for review by this Court.

The courts have held that in construing such instruments the contract must be read as a whole, a single sentence, phrase, or word not being decisive; and that in identifying the portions of the payments allocable to the support of minor children and not intended for the wife's support, it is proper to consider provisions for reduction in payments to the wife in the case of the death of a minor child, in the case of a minor child reaching his majority, and in the case of the remarriage of the wife. See cases cited in footnote 3, *supra*.

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[3] *Mandel* v. *Commissioner*, 185 F. 2d 50 (C. A. 7th); *Budd* v. *Commissioner*, 7 T. C. 413, affirmed, 177 F. 2d 196 (C. A. 6th); *Joslyn* v. *Commissioner*, 230 F. 2d 871, 879 (C. A. 7th); *Morsman* v. *Commissioner*, 27 T. C. 520; *Gantz* v. *Commissioner*, 23 T. C. 576; *Fleming* v. *Commissioner*, 14 T. C. 1308; *Leslie* v. *Commissioner*, 10 T. C. 807; Treasury Regulations 111, Section 29.23 (u)-1, *supra*, p. 4; H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 71-72, 73-74 (1942-2 Cum. Bull. 372, 409, 429); S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 83-87 (1942-2 Cum. Bull. 504, 568-570).

In this case the written property settlement agreement was incorporated in the Florida decree of divorce and at that time there were two minor children of the marriage. (R. 42.) The taxpayer contended before the Tax Court (R. 44) and the Court of Appeals (Pet.-A 5) that the agreement did not designate a sum payable for support of the minor children; hence that he is entitled to deduct the total sum of $125 a week paid by him under the agreement. The courts below, however, reading the agreement as a whole, concluded that $62.50 of the $125 weekly payments was earmarked by the parties as payable for support of the taxpayer's two minor children, and this construction was plainly warranted by the terms of the agreement.[4]

2. There is no direct conflict. Since determination of the question depends upon the construction of the particular agreement in issue, the taxpayer's contention (Pet. 10–11, 13) that the decision below is con-

[4] In summary, the provisions of the settlement agreement that were relied on by the Court of Appeals (Pet.-A 8) and which support its conclusion are: (1) that it is the intention of the parties that if each child attains the age of 21 the taxpayer is to pay the wife merely $62.50 per week; (2) that if the wife does not remarry, the original $125 per week payments are to be reduced by $31.25 as each child reaches majority; (3) that the $125 per week payments are to be reduced by $31.25 per week upon the death of either child prior to his majority; (4) that if the wife does not use the money for support of the children the taxpayer can pay the money to the children or for them and accordingly reduce the total weekly payments; and (5) that if the wife remarries, all payments for her are to cease and the taxpayer will pay merely $31.25 per week for the support of each child until such child attains the age of 21.

trary to the decisions in *Deitsch* v. *Commissioner*, 249 F. 2d 534 (C. A. 6th), *Estate of Hirshon* v. *Commissioner* (C. A. 2d), decided December 5, 1957 (58–1 U. S. T. C., par. 9116), modified on rehearing, January 3, 1958 (58–1 U. S. T. C., par. 9192), and *Weil* v. *Commissioner*, 240 F. 2d 584 (C. A. 2d), certiorari denied, 353 U. S. 958, is plainly without merit.

Indeed, the court below expressly agreed with the *Weil* case in its application of the law to the facts, although it did not agree with "the generality of some of its language", nor find the legal position taken there applicable here. (Pet.–A 5.) In the *Weil* case there was an explicit provision in the agreement that the payments to the wife were not to be reduced by reason of the death, majority of the children, or the fact that they no longer resided with her. (Pet.–A 7–8.) Only in the event of her remarriage were the payments to be reduced. While there is language in the opinion of the Court of Appeals in the *Weil* case indicating its disapproval of prior Tax Court decisions, the opinion concludes (p. 588) by adopting the view expressed in many of the decisions of that and other courts already cited, that the instrument "must be read as a whole" and that "no particular formula * * * is necessary." The *Hirshon* case is similar to the *Weil* case on its facts, in that the agreement there also can be read to provide that payments to the wife were not to be reduced by reason of the death, majority of the children, or the fact that they no longer resided with her, but only in the event of her remarriage.

The court below expressed disagreement with the Sixth Circuit's decision in *Deitsch* v. *Commissioner*, *supra* (Pet.-A 10); however, since both courts agree that this question is one of construction, and since both courts agree that the instrument must be read as a whole, this disagreement must be deemed to be factual in nature and to turn upon the Sixth Circuit's construction of the particular settlement agreement. The opinion in the *Deitsch* case fully supports this view. There the husband agreed to pay a specified sum each month to the wife for her support and maintenance, and the support and maintenance and education of his two children. In view of the fact that the payments were to be cut in half on the death, emancipation, or attainment of eighteen years by one of the children, and entirely eliminated if any of these events occurred in the case of both the children, the Tax Court concluded that the entire payments of $250 a month were intended solely for the support of the minor children, even though the agreement specifically stated that the payments were for the support and maintenance of the wife as well as of the children. The Court of Appeals, on the other hand, did not consider that the clauses which provided for cessation of the payments upon these contingencies constituted convincing evidence that the language of the agreement, which expressly declared the payments to be for the support of the wife, as well as of the children, was entirely to be disregarded; and that she could not under the terms of the agreement during the taxable year, when the children were of the ages of three and five, have

expended some or most of the periodic payments for her own support. Expressly considering the settlement contract as a whole, the Sixth Circuit found no provision which indicated that the $3,000 yearly payment was to be made for the benefit of the children alone. The Sixth Circuit did not indicate disagreement with its prior decision in *Budd* v. *Commissioner*, 177 F. 2d 198, but distinguished it on the facts of the particular agreement there involved. The facts in the present case are similar to those in the *Budd* case and in *Mandel* v. *Commissioner*, 186 F. 2d 50 (C. A. 7th), in both of which the Courts of Appeals concluded that the agreements under construction each fixed sums for child support. The agreement here affords even stronger evidence of that intent.

CONCLUSION

The decision below is plainly correct, is not in direct conflict with the decision of another Court of Appeals, and turns upon the interpretation of a particular agreement. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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